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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re FACEBOOK BIOMETRIC)	Master File No. 3:15-cv-03747-JD
INFORMATION PRIVACY LITIGATION)	
)	<u>CLASS ACTION</u>
This Document Relates To:)	
)	PLAINTIFFS' REPLY IN FURTHER
ALL ACTIONS.)	SUPPORT OF EMERGENCY MOTION FOR
)	A TEMPORARY RESTRAINING ORDER
)	AS TO LEVI & KORSINSKY LLP

1 Plaintiffs, by and through undersigned Class Counsel, respectfully file this reply in further
 2 support of their Emergency Motion for a Temporary Restraining Order as to Levi & Korsinsky,
 3 LLP (“TRO Motion”) (ECF No. 477), and in response to Levi & Korsinsky, LLP’s (“Levi &
 4 Korsinsky”) Response to the TRO Motion (“Response”) (ECF No. 479).

5 Levi & Korsinsky argues that the “TRO should be denied as moot” because they have
 6 already taken down the “Facebook material in question.” (ECF No. 479 at 2.) “It is well settled
 7 that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of
 8 its power to determine the legality of the practice.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455
 9 U.S. 283, 289 (1982); *see also Meyer v. Portfolio Recovery Assocs., LLC*, No. 11-cv-01008-AJB-
 10 RBB, 2011 WL 11712610, at *8 (S.D. Cal. Sept. 14, 2011) (“The Ninth Circuit has squarely
 11 rejected the proposition that any defendant can moot a preliminary injunction by simply
 12 representing to the court that it will cease its wrongdoing.”). Indeed, Class Counsel explained this
 13 very point-of-law to Levi & Korsinsky during their meet-and-confer conference in the evening of
 14 September 18, 2020. But, rather than agree to an injunction necessary to protect the Class from
 15 Levi & Korsinsky’s future misconduct and correct the false information Levi & Korsinsky already
 16 peddled to Class members throughout the day on September 18, Levi & Korsinsky doubles-down,
 17 “reserving all rights” to continue its misleading solicitation campaign, albeit now wanting Class
 18 Counsel’s apparent blessing. (ECF No. 479 at 2).¹ This, Class Counsel will not do.

19 Indeed, rather than grapple with the substance of Plaintiffs’ TRO Motion in any way, or
 20 dispute a single point made, Levi & Korsinsky appears to want a simple delay of the injunction
 21 proceedings, asking that the Court should await further meet-and-confer discussions on Monday.
 22 (Response at 1). But the Class cannot wait, and nor should this Court as this is exactly the type of
 23 situation a TRO is designed to remedy. As Plaintiffs’ explained in their TRO Motion, Levi &
 24 Korsinsky’s conduct already caused substantial injury to hundreds if not thousands of Class

25
 26 ¹ In fact, Levi & Korsinsky has agreed only to give Class Counsel “advance notice” if they
 27 choose to reactivate the identical misleading solicitation campaign. (ECF No. 479 at 2). In Levi
 28 & Korsinsky’s view, they can make minor alterations to their materials without informing Class
 Counsel of the changes. Such hollow concessions only strengthen the need for the issuance of a
 TRO.

1 members who have already seen Levi & Korsinsky's deceptive Facebook advertisement and
 2 website, by blatantly misleading them—at the very same time the Court's approved Class Notices
 3 were being disseminated—into thinking that they needed to retain Levi & Korsinsky to make a
 4 "claim." (TRO Motion at 1-2).² As the Southern District of Mississippi recently explained in its
 5 decision enjoining another law firm from improperly soliciting certified class members to opt-out:

6 [The firm's] "solicitations scheme relegates the essential supervision of the court
 7 to the status of an afterthought . . . [and] obstructed the district court in the discharge
 8 of its duty to protect both the absent class and the integrity of the judicial process
 9 by monitoring the actions before it."

10 *McWilliams v. Advanced Recovery Sys., Inc.*, 176 F. Supp. 3d 635, 641 (S.D. Miss. 2016) (quoting
 11 *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1203 (11th Cir. 1985)).

12 Accordingly, for the reasons stated herein and in Plaintiffs' TRO Motion, Plaintiffs
 13 respectfully request that this Court immediately enter a temporary restraining order against Levi
 14 & Korsinsky and all of its agents and attorneys, schedule a preliminary injunction hearing shortly
 15 thereafter, and grant such other and further relief as the Court deems just and proper. Entering a
 16 TRO now guarantees that the status quo is maintained while the Court and the parties assess the
 17 damage and determine how best to protect the Class Members that Levi & Korsinsky misled.
 18 Plaintiffs intend to seek, at a minimum, the following relief as a preliminary injunction against
 19 Levi & Korsinsky:

- 20 1. Immediate cessation to all further solicitation of Class members by Levi &
 21 Korsinsky;
- 22 2. A bar on any future solicitation of Class members by Levi & Korsinsky;
- 23 3. A full list and accounting of all potential Class members who contacted Levi &
 24 Korsinsky or who were otherwise exposed to Levi & Korsinsky's false advertising;³

25 ² One of the more unscrupulous things Levi & Korsinsky did was to intentionally misappropriate
 26 much of the parties' carefully-created and Court-approved Facebook ads for itself. (*Compare* ECF
 No. 477-3 (Levi & Korsinsky Facebook ad) *with* ECF No. 468 at 73-74 (parties' Facebook ads)).

27 ³ To the extent determining which potential Class members were exposed to Levi & Korsinsky's
 28 false advertising requires Facebook to conduct an investigation, Levi & Korsinsky should be
 ordered to pay for such investigation.

4. A corrective notice campaign at Levi & Korsinsky's expense in the form(s) prepared by Class Counsel and approved by the Court; and

5. A finding that all opt-outs solicited by Levi & Korsinsky are voidable at the Class member's option.

DATED: September 21, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 21, 2020.

s/ Paul J. Geller

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